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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5161

FRANK JOHNSON,

Appellant,

v.

LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

APPELLANT'S BRIEF

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May It Please the Court:

THE OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at ____ La. ____, 230 So.2d 825 (1970).

JURISDICTION

This is an appeal from the Supreme Court of Louisiana, the highest Court of the State of Louisiana. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2) and (3) since this case involves both the constitutional valid-

ity of a Louisiana Constitutional and statutory provision as well as a claimed right under the United States Constitution.

THE ISSUES PRESENTED

1.

Does a state statute that denies a defendant the benefit of a unanimous verdict while extending that benefit to defendants charged with both lesser and greater crimes deny such defendant equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

2.

Does a state statute that provides for conviction by a majority verdict fail to satisfy the requirement of the due process clause of the Fourteenth Amendment to the United States Constitution that a defendant not be convicted except on a finding of guilt beyond a reasonable doubt?

3.

Is a warrantless arrest illegal and is the line-up identification evidence obtained during the subsequent detention inadmissible when the arresting officers admit that they had ample opportunity to secure an arrest warrant but failed, refused, or neglected to do so?

STATEMENT OF FACTS

Frank Johnson, Appellant herein, is a Negro citizen of the United States, and a resident of Orleans Parish, Louisiana. Before dawn, on January 20, 1968, Appellant was asleep in his home. Also sleeping in Appellant's home were members of his family and a friend, Harold Hayes. (Tr. 172-173)[1] All of the occupants in the home were sud-

[1] Tr.—indicates the pages of the Trial Transcript. The Appendix has not yet been printed so that Appellant may assign its page numbers herein.

denly aroused by the entry of six men armed with shotguns who indicated they were police officers. (Tr. 172, 210) The officers did not possess a search warrant nor an arrest warrant, even though they planned to conduct a search of Appellant's home. (Tr. 202, 208) Lt. Field, officer in charge of the seizure of Appellant, testified that there was no reason for failing to secure an arrest warrant or a search warrant. (Tr. 208-209) Lt. Field indicated that the police went to Appellant's home to arrest Appellant for a robbery of a Mr. Catalano, although the officer did not know on what date or where the robbery had occurred. (Tr. 206-207)

Lt. Field testified that the probable cause to arrest was the identification by Mr. Catalano of two subjects (Frank Johnson and Harold Hayes) from mug shots as the persons who had robbed him. (Tr. 203) Before arresting Appellant in his home, Appellant was shown the police photograph and asked whether the photograph was his picture. (Tr. 176-177) Appellant was asked whether he was in fact Frank Johnson. *(Ibid.)* The police did not know that the other suspect, Harold Hayes, was the person who had stated he was Appellant's brother when the police entered Appellant's home. (Tr. 213-214) The police conducted a thorough search of Appellant's home but did not find the evidence they were seeking. (Tr. 211-213)

Four or five hours subsequent to his arrest, Appellant was booked for the armed robbery of Mr. Catalano. (Tr. 217) On January 23, 1968, Appellant was placed in a line-up which was described by Lt. Field as follows (Tr. 218):

> Q. Was this defendant identified at that lineup? A. He was identified.
>
> Q. He was identified by one of the victims? A. Yes, sir.
>
> Q. By one of the victims that you went out to arrest him for? A. Well, when we had the lineup, we went through our files and got victims of all

> truck driver holdups in that location and requested them to come back to view the lineup. He was identified by one of those victims, and then that is when he was charged on this charge.

Mr. Catalano, the person who Lt. Field testified had furnished the information for probable cause, did not make the identification of Appellant. A person by the name of Eugene Frischertz, who was the victim of another robbery on December 26, 1967, made the identification of Appellant. (Tr. 252)

Appellant was tried before a jury of twelve on May 15, 1968 (Tr. 4) and a majority of the jury (9 for, 3 against conviction) found him guilty as charged. (Tr. 79)

Appellant appealed to the Louisiana Supreme Court from his conviction, assigning, among others, the errors urged herein. The Louisiana Supreme Court heard and passed upon these questions, deciding them unfavorably to Appellant herein. Appellant subsequently filed his Jurisdictional Statement in this Court in April of 1970 and on November 9, 1970, this Court noted probable jurisdiction of this appeal.

ARGUMENT

PREAMBLE TO POINTS I AND II.

This case arose before this Court decided *Duncan v. Louisiana*, 391 U.S. 145 (1968). The decision of this Court in *DeStefano v. Woods*, 392 U.S. 631 (1968), holding that *Duncan* is not retroactive, removes from consideration here the *Duncan* holding that a defendant in a State trial for a serious offense is entitled to a jury trial of the same nature as he would be provided in a Federal Court. Appellant recognizes this limitation and does not rely upon the *Duncan* holding here.

But Appellant does not feel that the opinion of this Court in *DeStefano* precludes him from arguing here that he is entitled not to be convicted on a jury verdict of less

than the whole number of jurors—whether or not this Court in the future finds that the requirement for unanimity is included in the Sixth and Fourteenth Amendment guarantee of a jury trial. Appellant is not arguing that the right of a jury trial provides him the right to a unanimous verdict—although he would do so but for this Court's holding in *DeStefano.*

Nothing said in *Williams v. Florida,* 398 U.S. ___ (1970), holding that the Constitution permits a trial by fewer than the twelve jurors required at common law, impels a conclusion different than that urged herein by Appellant. *Williams* was an interpretation of *Duncan,* which as aforesaid is not here relied upon; moreover, this Court said in *Williams* that it did not consider the question of unanimity in the jury verdict. 398 U.S. at___, n. 46.

Appellant's first argument here is that because the State of Louisiana provides to defendants charged with both greater and lesser offenses the right to a unanimous verdict, the State cannot deny to defendant the right to such a verdict. Appellant urges that there is no rational basis for the distinction between defendants in his class and those charged with both greater and lesser offenses. Appellant's second argument that he is entitled not to be convicted and deprived his liberty except upon a verdict rendered by a unanimous jury is based upon what he shows hereinbelow to be the fact that a verdict rendered by fewer than the whole number of jurors fails to meet the constitutional standard of proof beyond a reasonable doubt. It seems that proof to a majority of jurors, even though such proof has to them been "beyond a reasonable doubt," is still only a variation of the "preponderance of the evidence" test since it is but a preponderance of the jurors who feel that guilt has been proved beyond a reasonable doubt in cases where the whole does not agree that the constitutional standard of proof has been met by the prosecution.

I.

ARTICLE 782, La C.Cr.P. AND ARTICLE VII, SECTION 41, La. CONST. OF 1921, DENIES TO PERSONS IN APPELLANT'S CLASS THE EQUAL PROTECTION OF THE LAWS

Appellant's class consists of all persons charged with crimes necessarily punishable with imprisonment at hard labor, who have been convicted of such crimes upon the basis of a majority, as opposed to a unanimous, verdict. Art. VII, § 41, La. Const. of 1921 and Art. 782, La. C.Cr.P., both permit such a conviction. The difference in treatment between persons in Appellant's class and those in the other two relevant classes (capital charges are triable only by a 12-man jury *requiring a unanimous verdict*; and, charges, the conviction for which only "may" result in imprisonment at hard labor, are triable by a jury of five *requiring a unanimous verdict*) has no rational basis. The Louisiana Supreme Court has stated that "the purpose, and the only purpose, of the framers of the [Louisiana] Constitution, in providing the different methods of trial thus mentioned, was to facilitate, expedite, and reduce expense in the administration of criminal justice." *State v. Lewis*, 129 La. 800, 56 So. 893, 894 (1911). No reason is given why the jury sitting in a case such as Appellant's should not be required to reach a unanimous verdict when lesser grade offenses require this right. This Court, in *Williams*, held that "the reliability of the jury as a fact finder hardly seems likely to be a function of its size." 398 U.S. at . Therefore, the larger number of jurors, when the quality of their verdict—unanimous agreement—is diminished, cannot serve as a rational basis for retaining in the small jury that quality of certainty reflected by the unanimous verdict while rejecting it in the more serious cases.

The function of a jury is to find the facts in a case and, sometimes, to assess punishment. In Louisiana, the jury may assess punishment in capital cases by withholding from its verdict the qualifying phrase, "without capital punish-

ment." Sentence to death is then mandatory. Art. 817, La. C.Cr.P. But this function of assessing punishment is not unique to the capital jury. In almost all cases, the jury may limit the assessment of punishment by finding one guilty of a lesser included offense. See Art. 814, La. C.Cr.P. The requirement for unanimity in the 12-man capital jury's verdict cannot be based upon its ability to assess punishment because, in effect, all juries have this ability. If unanimity of the verdict is required in capital cases to assure more certitude in the finding of a verdict, then it seems unreasonable that such a quality in the verdict should be denied to persons in Appellant's class. The constitutional standard, reasonable doubt, is required in all criminal cases.

A very good article has been written on the subject of the dynamics of jury decision-making: Note, "On Instructing Deadlocked Juries," 78 Yale L.J. 100 (1968). That article describes the internal techniques of decision making, *i.e.*, the means by which unanimity is reached by the jury, as "coalition pressure" and "verbal pressure." Coalition pressure depends upon the relative number of jurors in each opposing group; "such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size of the dissenting coalition increases." *Id.* at p. 110. Verbal pressure depends upon the willingness and ability of each opposing group to express its views. When each opposing group is willing and able to express its views, each side will do an equal amount of talking and remain in balance. When the smaller faction tires of talking, one or more of its members will usually be converted to the majority view. The process of jury deliberation and the effect of these internal "pressures" is best shown in statistics collected on hung juries.

Under a grant from the Ford Foundation, a study on the jury system was done at the University of Chicago. That study resulted in the publication of the book, Harry Kalven, Jr. and Hans Zeiger, *The American Jury* (Boston:

Little, Brown & Co., 1966). Statistics are collected and analyzed in Chapter 36, *id.*, "The Hung Jury", pp. 453-463. The study of the University of Chicago by the group hereafter referred to as the "Jury Project" was conducted in a rather unique manner. Five hundred and fifty-five judges were asked to fill out questionnaires in 3,576 cases. The judges were asked to supply details by which the nature of the reasons for the jury's determination could be ascertained. It was found that the judge and jury agreed upon the appropriate verdict in 78% of all cases. Table 120, *id.* at p. 456, shows that in 71% of the cases in which a jury was unable to return a verdict, their disagreement was based upon evidence factors. Table 58, *id.* at p. 186, shows that the reason for the disagreements between judges and jurors in all cases (22% of all the cases studied) was based upon the jury having a higher standard of reasonable doubt. This will be more fully explored in the arguments under Point II, *post.* Table 127, *id.* at p. 462, shows that in all the cases studied, where there are only two or three jurors voting for acquittal on the first ballot, a verdict was reached in all cases. The table further shows that where one juror voted for conviction on the first ballot, the jurors reached a verdict in all cases. Where only two or three jurors voted on the first ballot for conviction, a verdict was reached in 97% of the cases. The significant part of Table 127 in regard to the instant case, however, is the group of jurors ranging from four to eight voting initially for acquittal. In those cases, the jury were able to agree upon a verdict in only 85% of cases, thus leaving a margin of three in twenty cases in which the jury were unable to agree. These figures substantially support the conclusions drawn in the Note, "On Instructing Deadlocked Juries," *op. cit.*, that juries are less likely to succumb to coalition pressures of the majority as the size of the minority increases.

It thus becomes immediately obvious that both coalition and verbal pressures will operate differently when on the one hand a jury must find a unanimous verdict, and on

the other, when its final decision can be less than unanimous. When there are eight of twelve jurors for conviction on the first ballot, the statistics compiled by the Jury Project teach us that the jury will reach a uniformity of opinion only 85% of the time; whereas, when the first ballot has one more for conviction, the jury will always agree. Coalition pressure is not adequate to turn around a minority of four or more jurors a substantial amount of the time.

Table 125, *The American Jury*, p. 460, shows that after unsuccessful attempts to reach unanimous agreement in the jurors' verdict, more than half of the cases that would result in mistrial in jurisdictions requiring a unanimous verdict would be resolved by a verdict in Louisiana. The relevant parts of Table 125 are set out as follows:

Last Vote Of Hung Juries

Votes for Conviction	Per Cent
11:1	24
10:2	10
9:3	10
* * * * *	
3:9	4
2:10	8
1:11	–

Totalling these figures, 44% of the juries which would hang in other jurisdictions would convict in Louisiana. Twelve per cent of these juries would acquit. Thus, 56% would reach a verdict when, were unanimity required, they would hang. And Table 126, *id.* at p. 461, further shows the disparity in jurisdictions where unanimity is required and those where it is not. A mistrial occurs in jurisdictions where unanimity is not required only 55.3% as frequently as in those where it is required. This difference in frequency is substantial and permits the conclusion that in those close cases where there is a lack of unanimous agreement by the jury, the likelihood that one will be convicted is nearly twice as great as in those jurisdictions where un-

animity is required. Since Louisiana has both, unanimous and majority-verdict juries, it is evident that the likelihood of conviction in a close case is much greater in the type jury trial had by Appellant as opposed to that had by persons charged with both greater and lesser offenses. Appellant respectfully contends that he was denied equal protection of the laws because the denial of the requirement for a unanimous verdict increased the likelihood of his conviction.

There are no statistics gathered for the five-man jury requiring a unanimous verdict. It must be conceded, however, that uniformity of opinion in a group having different backgrounds and experiences—such as juries are supposed to be—is always harder to reach than a three-quarters majority opinion. It would be much easier to get three jurors to agree when the jury consists of four than it would to get all to do so. Yet, the State of Louisiana has not seen fit to reduce the quality of the verdict in five-man juries. *Williams'* teaching that factfinding reliability is not a function of the number of deliberators should apply to the contrast between the quality of verdicts in a jury trial such as that had by Appellant and one by a jury of five requiring uniformity of opinion.

It is an irrational and arbitrary classification that would deprive defendants charged with more serious offenses a benefit or right automatically accorded to those charged with lesser offenses. See *Staph v. United States,* 125 U.S. App. D.C. 100, 367 F.2d 326, 328 (1966). Louisiana's scheme of trial by jury does deny to defendants charged with more serious offenses the right to a unanimous verdict which is automatically accorded to all persons tried for lesser grade felonies in Louisiana. This distinction in treatment denied to Appellant the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the United States Constitution.

Moreover, as shown in the arguments under Point II, *post,* the unanimity requirement of the jury verdict is a

necessary element of the constitutional standard of guilt determination: proof of guilt beyond a reasonable doubt. *In re Winship,* ____ U.S. ____ (1970). Before the State may make distinctions in the treatment of its citizens on trial for criminal offenses, it must show a "compelling" interest in discarding the requirement for unanimity in the jury verdict. *Shapiro v. Thompson,* 394 U.S. 618 (1969), teaches that where a classification touches on a fundamental constitutional right, the constitutionality of the classification "must be judged by the stricter standard of whether it promotes a *compelling* state interest." 394 U.S. at 638. If it does not, it violates the Equal Protection Clause of the Fourteenth Amendment. *Ibid.* The only interests promoted by Louisiana's jury trial scheme, as stated by its highest Court, is "to facilitate, expedite, and reduce expense in the administration of criminal justice." *State v. Lewis, supra,* 56 So., at 894. Facilitation of proceedings does not promote a "*compelling* state interest" which justifies the diminution of the reasonable doubt standard of proof. It was easier before *Gideon v. Wainwright,* 372 U.S. 335 (1963), *Brown v. Mississippi,* 297 U.S. 278 (1936), *Miranda v. Arizona,* 384 U.S. 436 (1966), *Mapp v. Ohio,* 367 U.S. 643 (1961), and other such cases to convict a defendant. "Facility" had to succumb to the constitutional mandates not to deprive one of his liberty without due process and equal protection of the laws. The Constitution requires, and the state interest only allows the promotion of, orderly expedition and not mere speed in its proceedings. See *Powell v. Alabama,* 287 U.S. 45, 69 *et seq.* (1932). From the statistics derived from the Jury Project's survey (Table 123, *The American Jury,* p. 459), there is not a great deal of difference in the time spent deliberating in cases where a unanimous verdict is reached and those where the jury is determined to be hopelessly deadlocked. Certainly, Louisiana has no *"compelling"* interest that would allow it to dispose of its criminal cases more expeditiously than the forty-eight states which require unanimous verdicts of their juries. According to Table 122, *The Ameri-*

can Jury, p. 458, in only 12% of all cases in which the jury hangs does the deliberation exceed 10 hours. All of these cases involved trials lasting several days to over one week. The reduction of expense in the administration of criminal justice does not serve a compelling state interest which would allow the State to deny Appellant the right to a unanimous verdict. This Court has not held in the past that a discriminatory procedure in a criminal case may be applied on the basis of cost savings. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963), *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Cf. Smith v. Bennett*, 365 U.S. 708, 714 (1961); *Tumey v. Ohio*, 273 U.S. 510 (1927). And the avoidance of mistrials due to hung juries cannot serve as a rational basis for denying to Appellant the right to a unanimous verdict. Such a reason serves no basis for denying to one charged with a lesser or capital offense the right to a unanimous verdict. Louisiana's highest Court has even held that "the accused [has] the right to a mistrial in the event the jury could not agree." *State v. Rodman*, 208 La. 523, 23 So. 2d 204, 205 (1945). It is doubtful whether the avoidance of a mistrial could legitimately be a promotable state interest. The hung jury is a fundamental safeguard to liberty:

> I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise.

Huffman v. United States, 297 F.2d 754, 759 (5 Cir. 1962); (Brown, C. J. dissenting), cited by a unanimous Court in *Green v. United States*, 309 F.2d 852, 854 (5 Cir. 1962). See, also, *Walker v. United States*, 342 F.2d 22, 27-29 (5 Cir. 1965) (Brown, C. J., dissenting); *Andrews v. United States*, 309 F.2d 127, 129 (5 Cir. 1962); (Wisdom, J., dissenting), *cert. denied*, 372 U.S. 946; *Thaggard v. United States*, 354 F.2d 735, 739-741 (5 Cir. 1965) (coleman, J., concurring), *cert. denied*, 383 U.S. 958; *Wil-*

iams v. United States, 119 U.S. App.D.C. 190, 338 F.2d 530, 533 (1964).

There being no legitimate promotable state interest at take, it is a denial of equal protection of the laws to dis-inguish between Appellant's class and the others in the equirement for unanimity of opinion by the jurors. This Court should therefore reverse the Appellant's conviction based upon a jury verdict by only nine of the twelve urors empaneled for his trial.

II.

ARTICLE VII, §41, LOUISIANA CONSTITUTION AND ARTICLE 782, LA.C.CR.P., PERMIT CONVICTION UPON LESS THAN THE CONSTITUTIONALLY REQUIRED REASONABLE-DOUBT STANDARD OF PROOF.

In *In re Winship,* ___ U.S. ___, ___ (1970), this Court nequivocally stated that the government bears the burden f proving guilt *beyond* a *reasonable* doubt:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Winship, this Court rejected the "preponderance of the idence" standard of guilt determination. ___ U.S. at —, ___ and accompanying text.

It is the respectful belief of the Appellant that a determination by a majority of a jury is closely analogous to finding of guilt upon a "preponderance of the evidence" st; it fails to find guilt upon the constitutionally required andard. Rather, it finds guilt upon the "preponderance" the opinion of the jury as to what constitutes proof yond a reasonable doubt.

There are varying degrees of doubt which are reasonable. Table 58, *The American Jury*, p. 186, graphically represents the difference of opinion as to the reasonable-doubt standard between the judges and juries studied by the Jury Project's survey. It is there shown that the unanimous jury has a higher threshold of reasonable doubt because, in order to attain uniformity of opinion, it must adopt the value of reasonable doubt possessed by its most stringent member. *The American Jury*, p. 189 n. 5. In contrast, the twelve-man non-capital jury in Louisiana must adopt only such value of reasonable doubt as its nine *least* stringent members possess. This constitutes a substantial difference in the burden of proof required to be met by the government between cases requiring a unanimous verdict and those requiring only a nine-twelfths majority verdict.

We must assume that jurors are reasonable men. Otherwise the jury system does not make sense. *Winship* teaches that the burden of proof required to be sustained by the State is proof *beyond* a reasonable doubt. It is virtually impossible that it could have been that Appellant was convicted upon proof *beyond* a reasonable doubt when three jurors had a reasonable doubt about his guilt. There was not that degree of certainty demonstrated by the jury in this case which is constitutionally required under *Winship*. There was but a "preponderance" rather than "beyond" a reasonable doubt standard of proof employed in the guilt determining process at Appellant's trial.

Louisiana's jury trial system, which allowed conviction upon less than a unanimous verdict, hence less than proof beyond a reasonable doubt, contravenes the Appellant's rights under the Fourteenth Amendment not to be deprived his liberty without due process of law.

> It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men go free rather than risk

convicting one innocent man. This is, to be sure, an almost heroic commitment to decency. In the end the point is that the jury, as an expression of the community's conscience, interprets this norm more generously and more intensely than does the judge. If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system. Undoubtedly it was something of this sort that Lord Devlin had in mind when he said:

> Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.

The American Jury, pp. 189-190 (footnotes omitted). The foregoing closely aligns with the comments of this Court in *Winship, supra*, _____ U.S., at _____:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

There can be no doubt but that the degree of certainty expressed by the jury's verdict differs in cases where the jury has reached a unanimous verdict and those where it has not. It is impossible that the majority verdict, then, does not represent a substantial dilution of the standard of proof required to be met by the State under *Winship*. In this case, at least three jurors were left with the knowledge that people can be convicted when there existed in their minds a reasonable doubt as to Appellant's guilt. If

the total of all the minority jurors could be determined who have voted to acquit a defendant who was convicted by a majority verdict, it is certain that there would be found to exist a substantial number of persons who *are* left in "doubt whether innocent men are being condemned." 398 U.S., at___. Moreover, Appellant and all those convicted by a majority verdict, as well as all those who are aware of their convictions, are convinced that "his government [can and does] adjudge [persons] guilty of a criminal offense without convincing a proper factfinder of [their] guilt with utmost certainty."

The standard of proof expressed by a majority verdict is intolerable in our system of criminal justice as reflected by this Court's opinion in *Winship* that before one may be convicted his guilt must be shown "beyond a reasonable doubt." This Court's holding in *Winship* gives meaning to the statement by the Sixth Circuit Court of Appeals in *Hibdon v. United States*, 204 F.2d 834, 838 (6 Cir. 1953) that the unanimous verdict is the indispensable element of due process of law in a jury trial. The teachings of these cases therefore condemn the majority verdict for want of that degree of certainty of guilt which is required by the Fourteenth Amendment before a jury may convict and deprive a man of his liberty.

Since this case arose before this Court decided the *Winship* case, it is necessary here to urge that the *Winship* teachings must be applied retroactively. In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court pointed out that in the cases where new constitutional rules were applied retroactively, "the principle we applied went to the fairness of the trial—the very integrity of the fact-finding process." 381 U.S. at 639. In *Stovall v. Denno*, 388 U.S. 293, 297 (1967), this Court said:

> The criteria guiding resolution of the question [of retroactivity of a new constitutional rule] implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities upon the old standards, and (c) the effect

> on the administration of justice of a retroactive application of the new standards.

The purpose to be served by the new rule is the principle consideration. *Desist v. United States,* 394 U.S. 244, 249 (1969). When the purpose of the rule is not deterrence of official wrong-doing, but correction of a patent flaw in the fact-finding process, it should be given retroactive effect. *Linkletter v. Walker, supra.*

The requirement that guilt be proved beyond a reasonable doubt before one may be convicted of crime is not a new rule. Only the declaration of the rule's constitutional stature is new:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1789. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. [Citation omitted.] . . . (*Winship, supra,* at ____.)

There was no former rule construing the Constitution to have required anything but proof beyond a reasonable doubt before one could be convicted of crime. Therefore, there was no former standard upon which the State could have relied to determine that conviction by a majority verdict, hence by a lesser standard than proof beyond a reasonable doubt, was permissible. It is conceded that this Court has never considered the requirement for unanimity in the context of the reasonable-doubt standard of guilt-determination. But this fact does not weaken the case for retroactive application of the principle stated in *Winship;* it only points up the fact that there was no previous adjudication of this Court on which the State could have relied. Absent this basis for the State's provision relating to the type jury it provided persons within its jurisdiction

charged with crimes necessarily punishable by imprisonment at hard labor, the *Stovall* factor "(b)" does not favor only prospective application of *Winship* in the context here urged.

It is a well-known fact that most criminal matters that reach the formal accusation stage are resolved by plea-negotiation. Most of the persons imprisoned in Louisiana would not obtain a benefit from the retroactive application of *Winship* in the context here urged. In fact, in Louisiana, because it is such a well-known thing among the defendants and members of the bar that there is a greater likelihood of conviction in a case tried before a jury rendering less than a unanimous verdict, and because the law of Louisiana prohibits the waiver of trial by jury in favor of a bench trial in cases necessarily punishable by imprisonment at hard labor (Art. 780, La.C.Cr.P.), even more cases are resolved upon plea-negotiations than would be were there a right of trial by jury which could only report a unanimous verdict.

Even if it should be determined that the application of *Winship* in the context here urged would create a burden upon the administration of justice, it is urged that this burden would not be an undue one. Since the second criterion stated in *Stovall* does not favor only prospective application of the rule of *Winship*, it becomes a matter of balancing the purpose for the rule against the possible burden upon the administration of criminal justice in Louisiana and Oregon. The other States which allow conviction upon less than a unanimous verdict do so only in cases where the punishment does not exceed one year. See *The American Jury*, p. 189 n. 5. Since *Duncan v. Louisiana*, 391 U.S. 145 (1968), was decided more than a year ago, most if not all of the punishments imposed in trials in the other jurisdictions listed in note 5 above mentioned have been served. It is the respectful contention of Appellant that *Duncan* requires the verdict in State criminal trials to be unanimous because unanimity is the indispensable ele-

ment of trial by jury under the Sixth Amendment, *Hibdon v. United States, supra.*

This Court unequivocally stated the purpose for the reasonable-doubt standard of proof in criminal trials in *Winship:*

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatice and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." [Citation omitted] As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." [Citation omitted.]
>
> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall, supra,* 357 U.S. [513], at 525-526: "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden

> of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." [Citation omitted.]

When *Gideon v. Wainwright*, 372 U.S. 335 (1963), was made retroactive, this Court did not stop to consider the enormous number of convictions that were voided because of the high purpose for the rule of *Gideon*. See *McConnell v. Rhay*, 393 U.S. 2 (1969). The high purposes advanced by the rule of *Winship* are at least as important as those advanced by *Gideon*. It is respectfully submitted that the scales tip toward retroactive application of *Winship* since it is *impossible* that there could have been a fair trial when the State failed to satisfy the constitutionally imposed burden of proof (as reflected in the majority verdict of the convicting jury). It was only *probable* that a person had been denied a fair trial in the absence of counsel. In *Gideon*, this Court said: "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be *assured* a fair trial unless counsel is appointed for him." 372 U.S. at 344. In *Winship*, this Court held that a person *has not had* a fair trial when he has been convicted upon the basis of less than proof beyond a reasonable doubt.

This Court should determine that *Winship* is retroactive and, applying its principles to the instant case, it should reverse the Appellant's conviction and remand this case to the State court for proceedings not inconsistent with such an opinion.

III.

THE LINEUP IDENTIFICATION OF APPELLANT, UPON WHICH THIS CHARGE AGAINST APPELLANT WAS MADE AND UPON WHICH HIS CONVICTION IS BASED, WAS THE PRODUCT OF THE UNLAWFUL DETENTION OF APPELLANT, HENCE IS "FRUIT OF THE POISON TREE." THE CONVICTION OF APPELLANT BASED UPON EVIDENCE SO OBTAINED CONTRAVENED APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT AND ENTITLE APPELLANT TO HAVE HIS CONVICTION REVERSED FOR WANT OF DUE PROCESS OF LAW.

The facts upon which the foregoing allegation is based have been set forth in the Statement of Facts, *ante* p. . Appellant will not again belabor them here. The evidence upon the trial of this case conclusively shows that the police officers had sufficient time in which to obtain an arrest warrant, but that they failed to do so. It shows that Appellant was arrested in the middle of the night while he and his family were asleep in their home. The State has not shown at any time that there was any danger that Appellant would elude them during the time they moved to perfect his arrest. No other exigent circumstances have been urged to justify Appellant's arrest under the circumstances of his case. It is Appellant's respectful contention here that his arrest and subsequent detention were unlawful and in violation of his right under the Fourth and Fourteenth Amendments to the United States Constitution to be free from unreasonable seizures of his person. The lineup identification, which formed the basis of the charge upon which he was convicted in the State trial court, was obtained during this period of illegal detention. It is the Appellant's respectful contention here that the opinion of this Court in *Davis v. Mississippi*, 394 U.S. 721 (1969) is dispositive of the issue presented by this Point and that *Davis* compels that his conviction be reversed. Appellant proceeds first to show that an arrest warrant was required

in the circumstances of his case before a lawful arrest could be made; upon making such a showing, he then proceeds to show that *Davis* squarely applies in the circumstances of his case and requires that this Court reverse his conviction.

Appellant contends that a warrantless arrest is invalid when the arresting officer can give no excuse for his failure to secure a warrant, especially where, as here, the officer admits that he had no such excuse.

This Court has many times held that a search executed without a warrant is unlawful if it was reasonably practicable for the officers involved to obtain a search warrant. *Carroll v. United States*, 267 U.S. 132, 156 (1925); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931); *Taylor v. United States*, 286 U.S. 1, 6 (1932); *Chapman v. United States*, 365 U.S. 610, 614-615 (1961); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

In *Carroll v. United States, supra*, this Court noted that in the case of searches the general rule that a warrant is required is subject to an exception where it is not reasonably practicable to obtain one and the officers have probable cause for the search. This Court said (267 U.S. at 156):

> In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

To justify a search without a warrant, the officers must show first that it was not reasonably practicable to obtain a warrant and second that the officers had probable cause. Generally a warrant is required; officers can proceed without a warrant only when it is not reasonably practicable to obtain one; even then the officers can proceed without a warrant only if they have probable cause. It is crucial to observe that the exception from the warrant requirement is carved out only for those cases where it is impossible to obtain a warrant. The analysis of probable cause

comes into play only after establishing the impracticability of obtaining a warrant. If it was reasonably practicable for the officers to obtain a warrant, then the search without a warrant is illegal; even though the officers can establish probable cause without a doubt, *Agnello v. United States,* 269 U.S. 20, 33 (1925), the essential predicate of impracticability to obtain a warrant must be laid.

This Court, in the *Trupiano* and *Taylor* cases, both *supra,* reversed convictions because the officers made searches without warrants, having had ample opportunity to obtain them. This Court required a warrant solely upon the basis of the *practicability* of obtaining one. Two years after *Trupiano* was decided, it was overruled by *Rabinowitz v. United States,* 339 U.S. 56, 66 (1950); but the *Rabinowitz* case soon came under fire and gradually lost its influence as a precedent. *Chimel v. California,* 395 U.S. 752, 768 (1969). The *Chimel* case overruled *Rabinowitz* "insofar as the principles they [*Rabinowitz,* and *Harris v. United States,* 331 U.S. 145 (1947)] stand for are inconsistent with those we have endorsed today . . ." *Ibid. Chimel* reinstated the principle that a warrant must be obtained where one is practicable to obtain. There is here no question of the retroactivity of *Chimel.* The Court said that *Harris* and *Rabinowitz* were no longer to be considered as precedents. *Trupiano* and *Taylor* existed prior to the instant case. They are now good law.

There is no question whether the principles of *Taylor* and *Trupiano* cases apply to arrest warrants. This Court has said:

> In *Giordenello* [*v. United States,* 357 U.S. 480 (1958)], although this Court construed the requirement of "probable cause" contained in Rule 4 of the Federal Rules of Criminal Procedure, it did so "in light of the constitutional" requirement of probable cause which that Rule implements. *Id.,* 357 U.S. at 485. The case also involved an arrest warrant rather than a search warrant, but the Court said: "The language of the Fourth Amendment, that

> '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." *Id.*, 357 U.S., at 485-486. . . . Accordingly, under *Ker v. California*, 374 U.S. 23 [33] [(1963)], they ["(t)he principles announced in *Giordenello*"] may properly guide our determination of "probable cause" under the Fourteenth Amendment.

(*Aguilar v. Texas*, 378 U.S. 108, 112 n. 3 (1964)). Since *Giordenello* holds that an arrest without a valid warrant is violative of the Fourth Amendment, and since *Ker v. California*, holds the States to the same principles under the Fourteenth Amendment as the Fourth binds the Federal Government, then it is clear that an arrest without a valid warrant, unless there is a recognizable exception applicable, is violative of the Fourteenth Amendment.

There is no such exception applicable to the instant case. The nearest analogy that can be found in the opinions of this Court is the case of *Warden v. Hayden*, 387 U.S. 294 (1967). There the Court was faced with a situation where the police were notified that an armed robber wearing a light cap and dark jacket had entered a house. The police were in close pursuit of such a person. This Court sustained the action by Maryland officers, saying (387 U.S. at 298-299):

> We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. *Under the circumstances of this case, "the exigencies of the situation made that course imperative." McDonald v. United States*, 335 U.S. 451, 456 (1948). The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require

> police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. *Speed here was essential,* and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape. (Emphasis added).

The instant case is easily distinguishable. The police had for hours possessed all the information with which they acted at the time they moved against the Appellant. The police did not move against Appellant in hot pursuit, but in the middle of the night while he and his family slept. Having delayed as long as they did, the police conduct itself belies any feeling of them that there were exigent circumstances present which "made that course imperative." It is respectfully submitted that the thrust of *Warden v. Hayden* is not that in crimes where dangerous weapons are involved the police may abandon the constitutionally required limitations upon the exercise of their power and proceed without judicial review of the facts and circumstances known to them to determine whether probable cause exists for the intended police movement. If that were the case, then in all crimes of violence the police could dispense with any of the orderly procedures and make up their own rules as they go. This is clearly contrary to the principles announced by this Court in *Johnson v. United States,* 333 U.S. 10, 13-14 (1948), that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to*

> *issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . .* (Emphasis added.)

Warden v. Hayden was based upon the existence of exigent circumstances. The fact that the case involved an armed robbery did not furnish the police justification to enter the house and search for the suspect. It was the fact that they were in hot pursuit immediately after the occurrence of an armed robbery, when there is yet a presumption that the person is armed and dangerous, that the exigency was found. Since there were here no similar compelling need for the officer to make an immediate arrest while the investigation and necessary judicial proceedings continued, it is difficult if not impossible to conceive how the information obtained from the truck driver *several weeks after* the robbery supplied the element essential to justify the officer's by-passing the orderly warrant procedure. The arrest was unlawful for want of judicial pre-determination of probable cause for Appellant's arrest and for the deliberate circumvention by the police of the mandates of the Fourth Amendment, made enforceable against the States through the Fourteenth Amendment.

In the case of *Davis v. Mississippi*, 394 U.S. 721, 727-728 (1969), this Court recognized the general requirement that the authorization of a judicial officer be obtained *in advance of detention.* Appellant views the import of *Davis* to be the application of the rule that warrants must be obtained in advance of detention whenever "reasonably practicable" failing which evidence obtained during the period of illegal detention, as a direct result of that detention, will be suppressed.

In the *Davis* case, this Court refused to distinguish between illegally obtained fingerprints and illegally obtained eyewitness identification and confessions. 394 U.S. at 723-724, 727. This Court said (394 U.S. at 724):

> Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter over-reaching governmental conduct prohibited by the Fourth Amendment. . . . [I]n *Mapp v. Ohio, [supra]* we held that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."

This Court expressly adopted the conclusion of the opinion of the Court of Appeals for the District of Columbia in *Bynum v. United States,* 104 U.S. App. D.C. 368, 262 F.2d 465 (1958). The *Bynum* Court has phrased the issue:

> But there remains the question whether the fact that an illegal arrest enabled the police to take these fingerprints while the suspect was illegally detained is in itself and without more a sufficient ground for excluding them from evidence. The Court below thought it was not. We think it is.

There is no doubt in the instant case that the line-up photograph and identification of the Appellant (entered over the objection and exception of trial counsel) resulted solely from "the fact that an illegal arrest enabled the police [to place the Appellant in a line-up before several victims of similar robberies which were then under investigation] while the suspect was illegally detained." *Bynum v. United States, supra. Bynum* has been explicitly held to govern the identification at a line-up after an illegal arrest. *Gatlin v. United States,* 117 U.S.App.D.C. 123, 326 F.2d 666, 673.

Appellant was never prosecuted for the crimes for which he was originally arrested and booked. He was charged and convicted on the basis of an identification made by a person not the victim of the crimes for which Appellant had been arrested and was being detained. There had been no judicial determination that Appellant should be

committed to jail so as to legitimate the illegal arrest. Formal charges had not been pressed by the State at that time. In this regard, Appellant's detention was purely "investigatory." Exploitation of an illegal arrest and "investigatory detention" cannot be sustained by this Court if the opinions in the *Davis, Gatlin* and *Bynum* cases are to hold any security for the rights of our people. See *Wong Sun v. United States,* 371 U.S. 471, 488 (1963); *Johnson v. United States, supra,* 333 U.S. at 15. The trial court should have excluded the line-up identification, failing which it committed prejudicial error. *Davis v. Mississippi, supra; Gatlin v. United States, supra.*

The record shows that this evidence constituted the major vehicle of prosecution. It therefore cannot be said that this error was "harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24 (1967); *Fahy v. Connecticut,* 375 U.S. 85 (1964).

The evidence of Appellant's identification at the line-up conducted while Appellant was illegally detained should have been suppressed. For failure of the trial court to have done so, the Appellant's conviction must be reversed.

CONCLUSION

For the above and foregoing reasons, Appellant's conviction should be reversed and this cause remanded to the Louisiana Supreme Court for entry of a mandate in conformity with such an opinion.

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